

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

AUG - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of
MARTHA J. HUBER, et al.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

MM Docket No. 93-51

File Nos. BPH-911114ME,
et al.

TO: Honorable Richard L. Sippel
Administrative Law Judge

**REPLY TO STATON'S OPPOSITION TO
PETITION TO ENLARGE**

Martha J. Huber (Huber), by her attorneys, now replies to the "Staton's Opposition To Petition To Enlarge" filed by Staton Communications, Inc. on July 22, 1993.

In her July 9, 1993 "Petition to Enlarge Issues against Staton Communications, Inc.", Huber demonstrated that three character issues must be specified against Staton: a real-party-in-interest issue, an issue as to whether Staton made misrepresentations or lacked candor in certifying to its financial qualifications, and an issue as to whether Staton made misrepresentations or lacked candor in the Stock Subscription and Shareholder's Agreement submitted with its application. Despite the arguments made by Staton, all three issues must be specified.

I. REAL-PARTY-IN-INTEREST ISSUE

In her petition, Huber demonstrated that nonvoting stockholder Kenneth Ramsey, through his own actions and the actions of his agent Charlie Thompson, had exercised greater

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control over his application than nonvoting stockholder Robert Fish in Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1233, 71 RR 2d 1386, 1393-1394 (D.C. Cir. 1993). Of course, the Court held in Weyburn that the Commission was required to specify and to try a real-party-in-interest issue. Staton's opposition is remarkable because it makes no attempt to show that voting stockholder Mildred Staton has exercised control. Staton also makes no attempt to distinguish Ramsey's pattern of control on the facts from the pattern of control in Weyburn. Instead, Staton argues that no qualifications issue can be specified because Ramsey was listed as a nonvoting stockholder, and it relies upon Evansville Skywave, Inc., 7 FCC Rcd 1699, 70 RR 2d 835 (1992). Staton's legal argument cannot withstand scrutiny, and Evansville Skywave is readily distinguishable from Staton's situation. A real-party-in-interest issue must be specified.

Staton attempts to distinguish Weyburn from this case on the basis that the nonvoting stockholder in Weyburn (Fish) was allegedly not a party to the application because he was not listed in the application. Staton Opposition, P. 4. In fact, Fish was listed in James River's application and he was considered a party to the application. Attachment 1 to this reply is an amendment of the application at issue in Weyburn reporting Fish's acquisition of non-voting stock. Moreover, the Administrative Law Judge made clear in initially refusing to add a real-party-in-interest issue that he considered Fish to be a disclosed party to the application. See Weyburn

Broadcasting Limited Partnership, FCC 90M-1737 (released June 20, 1990) at ¶ 6 (Attachment 2 to this motion). The Court of Appeals' opinion makes clear that a real-party-in-interest issue must be specified when a nonvoting stockholder has acted as a real-party-in-interest irrespective of whether such person is listed in the application. In the absence of any evidence rebutting Huber's showing of Ramsey's utter domination over the application, a real-party-in-interest issue must be specified.¹

Staton claims that Evansville Skywave, Inc., supra, bars the addition of a qualifications issue. Staton Opposition, Pp. 4-6. Initially, Staton misstates the holding of that case when it claims that "the full Commission reversed the ALJ's addition of the issue". Staton Opposition, P. 5. In fact, the Commission did not delete the issue but reversed the adverse resolution of the basic qualifications issue. At no point did the Commission hold that it was error for the issue to be initially added. A petition seeking issue enlargement is not required to show that its competitor must be disqualified. Instead, an issue must be specified if a prima facie case has been made and substantial and material questions of fact exist. 47 U.S.C. §309(d).

Since the Court of Appeals' decision in Weyburn requires the specification of a real-party-in-interest issue, the

¹ Staton's attempt to describe Ramsey's activities as "limited activities at the pre-formational stage" (Staton Opposition, P. 4) is misleading. Huber's petition demonstrated that Ramsey's activities were neither "limited" nor confined to the pre-organizational stage.

Presiding Judge need not formally decide the applicability of Evansville Skywave to this case. To the extent there are any inconsistencies between the two cases, the Evansville Skywave

established, however. Instead, Mr. Ramsey (or his wife) pays bills directly out of their account. Ramsey Dep. Tr. 38-41. The same minutes (at P. 3) also instruct Ms. Staton to issue stock. As of her deposition, Ms. Staton had never received a stock certificate. Staton Dep. Tr. 23.

As Huber showed in her petition and will show in greater detail below, Staton has also misrepresented facts concerning its ownership structure. The stock subscription agreement submitted with the application contained the false statement that Ms. Staton had reviewed Ramsey's financial statement. That statement was a transparent attempt to lend credibility to the bona fides of Staton. Huber also showed that Ms. Staton made misrepresentations when she certified to Staton's financial qualifications. Since Staton ignored important corporate formalities and misrepresented facts, Evansville Skywave supports the addition of basic qualifications issues against Staton.

Staton's attempt to consider Charlie Thompson's actions in isolation from the actions directly taken by Ramsey (Staton Opposition, Pp. 2-3) must be rejected. Thompson has clearly acted as Ramsey's agent, and his actions are fully attributable to Ramsey. Huber phrased the requested issue in terms of whether Thompson and/or Ramsey was a real-party-in-interest in order to allow full consideration of Thompson's role under the added issue. Staton has offered no meaningful distinction between this case and the facts in Weyburn, and a real-party-in-interest issue must be specified.

II. MISREPRESENTATION/LACK OF CANDOR- FINANCIAL CERTIFICATION

In reviewing Staton's opposition to Huber's request for a financial certification (Staton Opposition, Pp. 6-10), it is beyond doubt that Mildred Staton did not have before her a bank letter from Home Federal Trust Bank of Georgia when she signed the application on November 13, 1991. Statons' opposition offers the unique argument that an applicant need not have financial documentation in hand when it signs the application so long as the documentation is in hand before the application was filed. Staton's argument wholly ignores the purpose behind an applicant's certification of an application. The argument is also unavailing because Ms. Staton, the principal who certified Staton's application, did not have the bank letter in hand on the date the application was filed. Indeed, the application was sent to Pittsburgh for filing before the bank letter existed. Staton's certification of the application was clearly false, and a character issue must be specified.

When Ms. Staton signed the application on November 13, she certified that all of the statements in her application, including the financial certification, were true and correct. Staton does not dispute that documentation is an essential element of financial qualifications. Under Staton's theory, an applicant's certification of the application would become meaningless because an applicant could certify the application without reviewing the financial documentation. When Ms. Staton signed the application, she had, at most, a vague

promise that a letter would be forthcoming. She had no way of knowing, however, that the letter would comply with the Commission's requirements, especially since she had no dealings with the bank. If the bank changed its mind or issued a deficient letter, Staton's certification would clearly be false. Just as an applicant must have the engineering portion of the application in hand when it certifies, it must have its financial documentation in hand when it certifies to its financial qualifications.

Lynn Broadcasting, 7 FCC Rcd 8563, 71 RR 2d 1321 (Rev. Bd. 1992) (Staton Opposition, Pp. 8-9) does not help Staton. That case does not stand for the general proposition that an applicant may certify first and obtain documentation later. In Lynn, the applicant had a financing letter in hand at the time of certification. The structure of the applicant changed after the date of the original letter but prior to certifi-

7 FCC Rcd at 8566 n.7, 71 RR 2d at 1325 n.7 (emphasis in original). In this case, there was no documentation in hand at the time of certification, and the certifying principal had not communicated with the bank, so the documentation requirement was not complied with.

Indeed, Staton's application was sent to the Commission on November 14. See the cover letter submitted as Attachment 4. Thus, Staton had no way of knowing whether documentation would be in hand when the application was filed. Under its own interpretation of the documentation requirement, then, Ms. Staton had no reasonable basis for certifying. Furthermore, Ms. Staton did not have the bank letter until after the application was filed. Staton Dep. Tr. 34-35, 37. Even under Staton's own interpretation of the financial certification requirement, therefore, its certification was false. Since its certification was directly contrary to the Commission's plain requirements, a false certification issue must be specified.

III. MISREPRESENTATION/LACK OF CANDOR - SUBSCRIPTION AGREEMENT

The "Stock Subscription and Shareholders' Agreement" submitted with Staton's application contained the statement that Ms. Staton had reviewed Mr. Ramsey's financial statement. Staton admits that that statement was false, and Ms. Staton clearly knew at that time that she had not reviewed Ramsey's financial statement. A misrepresentation issue must be specified when a false statement is made "coupled with proof that the party making it had knowledge of its falsity."

Capital City Broadcasting Co., 8 FCC Rcd 1726, 72 RR 2d 439, 448 (Rev. Bd. 1993). Both elements are present here, and an issue must be specified.

Staton argues that the statement in question was "boilerplate language", that Mr. Staton "overlooked" the footnote, that "Ms. Staton did not think it was essential to review Ramsey's personal financial statement", and that Staton had no motive to deceive. Staton Opposition, Pp. 10-12. None of these arguments have any merit. No support is offered for the proposition that the language was "boilerplate". The statement was a clear attempt to buttress the bona fides of Staton by exaggerating what Ms. Staton knew of Ramsey. The claim that Ms. Staton "overlooked" the footnote is contradicted by her deposition testimony that she read the agreement before she signed it. Staton Dep. Tr. 41 (Attachment 5 to this reply). In any event, Ms. Staton was clearly responsible for the truth of the statements made in the application. Indeed, if she did sign the agreement without reviewing the entire document, her inaction shows an extremely casual attitude towards going into business with a total stranger and a reckless disregard for the accuracy of her application. The claim that Ms. Staton did not think it important to review the financial statement is no excuse for claiming that she did review the statement. Applicants may not lie to the Commission just because they think the lie is unimportant. Finally, Staton did have a motive to deceive the Commission about whether Ms. Staton reviewed Ramsey's

financial statement because the statement supported the bona fides of its application. In any event, a motive to deceive is not an essential element of misrepresentation, since "[t]he willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). The statement was false when it was made, and Ms. Staton knew it was false. A misrepresentation issue must therefore be specified.


IV. CONCLUSION

Accordingly, Huber asks the Presiding Judge to specify the issues requested in her "Petition to Enlarge Issues Against Staton Communications, Inc."

Respectfully submitted,

MARTHA J. HUBER

By


Morton L. Berfield

By


John J. Schauble

Cohen and Berfield, P.C.
1129 20th Street, NW, # 507
Washington, DC 20036
(202) 466-8565

Her Attorneys

Date: August 3, 1993

AMENDMENT

James River Communications Corporation herewith amends its application, File No. BPH-84121600, to reflect the following:

1. Section II, page 2, item 5(a) is amended as follows:

Dr. Renard A. Charity, Dr. Cynthia M. Charity and Dr. Michael K. Kyles, are no longer shareholders of the corporation. They no longer have association whatsoever with the applicant. Mr. Robert Fish of 50 Royalston Road, Wellesley, MA, 02181, purchased all the stock held by the Drs. Charity and Dr. Kyles on

3. The response to Section II, item 9 is supplemented to provide as follows:

Mr. [redacted] and Mr. [redacted]

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

COHEN SONBERGFIELD

Benns' Motion

2. Benns seeks the addition of the following issues against James River:

(a) To determine whether there has been a transfer of control of James River Communications Corporation from Claudette McDaniel to Robert E. Fish, and to determine whether James River Communications Corporation has wrongfully concealed such transfer of control from the Commission;

(b) To determine whether Robert E. Fish is the real party in interest in the application of James River Communications Corporation;

(c) To determine whether in testimony given in this proceeding the principals of James River Communications Corporation misrepresented facts or were lacking in candor; and

(d) To determine whether, in light of the evidence adduced under the foregoing issues, James River Communications Corporation possesses the requisite basic and comparative qualifications to become a Commission licensee.

Benns' request is without factual and legal support and will be denied.

3. Benns' request for a transfer of control¹/real party in interest issue rests on the fact that (a) McDaniel has executed promissory notes with Robert Fish, James River's non voting stockholder covering her share of prosecution expenses; and (b) Fish has paid legal bills directly to James River's communications firm. Neither of these action demonstrate that Fish has exercised decisional control over James River.

4. No evidence has been presented that Fish has or intends to use the promissory notes as a mechanism to wrest decisional control over James River from McDaniel. The notes appear to be part and parcel of a legitimate business arrangement between the principals -- McDaniel being fully obligated to pay

¹ Benns' request for a separate transfer of control issue is difficult to fathom since violations of Section 310(d) of the Act apply to permittees and licensees but not to applicants. It would appear that Benns had in mind a combination of the two requested issue, judging by the heading on page 4 of Benns' motion.

under the notes ² and Fish being fully entitled to collect for advances made. Even were there to be a default in the future, there is no basis in these notes to deprive McDaniel of her right and power to continue serving as James River's sole voting stockholder. Because the notes are not secured by McDaniel's stock in James River, by the station's assets or by the Commission's authorization (barred by law), Fish's sole recourse would be to institute litigation against McDaniel and to attempt to attach nonbroadcast assets.

5. Significantly, Bennis has not presented evidence that Fish is actually making decisions for the corporation or has ever taken any action other than paying bills due the corporation. Indeed, the Memorandum of Agreement, executed in January 1988 between McDaniel and Fish (attached to the Motion to Enlarge Issues as Exhibit B) positively denies Fish any right or authority to exercise decisional control. The Memorandum of Agreement provides:

1. McDaniel shall be responsible for the prosecution of the corporation's FCC application and, if the application is granted, for the management and operation of the new Richmond FM station....
2. Fish acknowledges that he (a) will not serve as either an officer or director of the Corporation; (b) will not [be] permitted to participate in the management or operation of the Corporation's business as an employee, consultant, or in any other capacity; and (c) will not be retained to perform services of any sort for or on behalf of the Corporation. ³

2 Unlike many other cases, the minority principal here is contributing financially to the prosecution of the application.

3 Bennis alleges incorrectly that McDaniel for a time did not own 500 shares of non-voting stock but owned exclusively voting stock. This conclusion is urged by Bennis based upon her reference to the Memorandum of Agreement. Bennis ~~has overlooked the amendment to the Memorandum of Agreement in this proceeding.~~

6. In Virginia Communications, Inc., 62 RR 2d 1001 (1987) (Virginia Communications), the Commission set forth the standard for a real party in interest issue. There the Commission explained:

It is well established that the test for determining whether a third party is an undisclosed real party in interest is whether the third party has an ownership interest in the application or will be in a position actually or potentially to control the operation of the facility. Mobile Phone of Texas, Inc., 52 Rad. Reg. 2d (P&F) 1455 (1982), citing KOWL, Inc., 49 FCC 2d 962 [31 RR 2d 1589] (Rev. Bd. 1974)...

There are two essential elements to the real party in interest standard. The first is the existence of an undisclosed third party. Of course, here, Fish, the one identified by Benns as the "real party" is a disclosed party to the application and has been so disclosed as long as he has been a non-voting stockholder. Therefore, this element has not been met. The second is the presence of evidence that the third party has an actual undisclosed ownership interest or will be in a position actually or potentially to control the operation of the facility. There is no evidence that Fish owns any stock in the applicant except for that which has already been disclosed. Furthermore, as established supra, Benns has not submitted any factual information which would raise a question as to whether Fish will actually or potentially exercise voting control. Indeed, the Memorandum of Agreement discussed supra specifically provides to the contrary and McDaniel has testified at hearing

8. To establish a prima facie basis for the addition of a misrepresentation or a lack of candor issue requires evidence of an intent to deceive the Commission. Mere omissions or inconsistencies in the record are not enough. As the Review Board reiterated in Intercontinental Radio, Inc., 56 RR 2d 903 (Rev. Bd. 1984), modified on other grounds, 57 RR 2d 1616 (1985),

"[O]missions or inconsistencies" unaccompanied by evidence of a "willingness to deceive" are not a cause for action. Garrett, Andrews and Letizia, Inc., 86 FCC 2d 1172, 1180... (Rev. Bd. 1981). Misrepresentation is a serious charge which the Commission has equated with "perjury," Greenco, Inc., 39 FCC 2d 732, 737... (1973).

The Review Board has stated that when accurate information is supplied voluntarily by a party and is part of the open record, an intent to deceive is difficult to find. Intercontinental Radio, Inc., 56 RR 2d, at 926. Rather, the movant must find in the factual record a basis to raise a substantial and material question of fact as to whether "a concerted attempt to deceive the Commission" exists. See Intercontinental Radio, Inc., 56 RR 2d, at 927. Here

and largely on the basis of surmise and conjecture.⁴ Counsel has an obligation to insure that charges of misconduct are grounded in fact, not surmise or conjecture. Counsel's failure to adhere to this principle can not be condoned. However, no purpose would be served by launching an inquiry and, thus, further delaying resolution of this case, particularly in the absence of evidence that Ms. Benns was an active participant in her counsel's legal strategy. The requested abuse of process ~~issue~~ will not be added.

Accordingly, IT IS ORDERED, That the "Motion For Leave To Supplement 'Further Motion To Enlarge Issues'" filed May 10, 1990 by Benns IS GRANTED.

IT IS FURTHER ORDERED, That the "Further Motion To Enlarge Issues" filed April 20, 1990 by Barbara B. Benns IS DENIED.

IT IS FURTHER ORDERED, That the "Motion To Enlarge Issues Against Barbara B. Benns For Abuse Of The Commission's Processes" filed May 4, 1990 by James River Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin
Administrative Law Judge

⁴ Benns' petition to enlarge, discussed, above, is strewn with footnotes containing editorial asides which have no factual basis and rest solely on counsel's surmise. Such comments should not be included in a pleading filed with the Commission.

MINUTES OF FIRST MEETING

OF

BOARD OF DIRECTORS

OF

Staton Communications, Inc.

The first meeting of the Board of Directors of the above captioned Corporation was held on the date, time and at the place set forth in the written Wavier of Notice signed by the Director, fixing such time and place, and prefixed to the minutes of this meeting.

There were present the following:

Mildred Staton,

being the sole member.

The meeting was called to order by Mildred Staton

The meeting then proceeded to the election of officers. Upon nomination duly made and seconded, the following were elected and qualified:

President: Mildred Staton

Secretary/Treasurer: Mildred Staton

The President and Secretary/Treasurer of the Corporation thereupon assumed the Chair and his duties.

The Secretary presented to the meeting:

- (1) A proposed copy of the Certificate of Incorporation. The Certificate had not yet been received back from the Secretary of State of the State of Kentucky, but

counsel for the corporation had reported to the Secretary that the State had accepted the corporation.

- (2) Copy of the By-Laws of the Corporation, as adopted by the Incorporator; and
- (3) Resolutions adopted by the Incorporator.

The Chairman presented to the meeting a Stock Subscription Agreement addressed to the Corporation by, executed by Mildred J. Staton and Kenneth L. Ramsey, dated November 14 and 13, 1991, respectively, pertaining to the issuance of the shares of the Corporation. A full consideration of the matter by the Board of Directors followed. Upon unanimous consent of the Board of Directors, it was

RESOLVED, that the Stock Subscription Agreement dated November 13 and 14, 1991, pertaining to the issuance of shares by Staton Communications, Inc., be and the same hereby is in all respects, approved for and on behalf of the Corporation; and it was further

RESOLVED, that a copy of such Stock Subscription Agreement be annexed to the minutes of this meeting; and it was further


RESOLVED, that the Corporation issue and deliver to the above mentioned upon receipt of the consideration therefore pursuant to the terms of the aforesaid proposal, certificates representing a total aggregate of 200 Class A voting, and 800 Class B nonvoting shares of the Corporation, \$0.10 par value per share; and it was further

RESOLVED, that the shares so issued shall be fully paid and non-assessable, and that the value of the aforesaid consideration and the stated capital with respect to such shares shall be \$1,000.00; and it was further

RESOLVED, that the officers of the Corporation be, and they hereby are, authorized, empowered and directed to take any and all steps, and to execute

and deliver any and all instruments in connection with consummating the transaction contemplated by the aforesaid proposal and in connection with carrying the foregoing resolutions into effect.

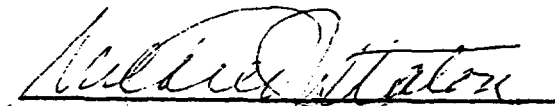
There being no further business to come before the meeting, upon unanimous consent of the Board of Directors, the same was adjourned.


Secretary

DATED: _____, 1991

ATTEST:

Board of Directors


Director

H-25-2E

FCC/MELLON NOV 15 1991

BRYCE & EMERT
212 S. Peters Road
KNOXVILLE, TENNESSEE 37923
(An Association)

Philip J. Bryce
Stanley G. Emert, Jr.

David P. Klucken

DUPLICATE

P.O. Box 52225
Knoxville, Tennessee 37950-2225
615/ 690-5566
615/ 690-4967 (fax)

November 14, 1991

Federal Communications Commission
Mass Media Services
c/o Mellon Bank
Three Mellon Bank Center
525 William Penn Way
27th Floor, Room 153-2713
Pittsburgh, Pennsylvania 15259-0001

BY OVERNIGHT COURIER

ATTN: Wholesale Lockbox Shift Supervisor

Re: Filing Fee, Staton Communications, Inc.
New FM Application

To Whom It May Concern:

I enclose the original and proper copies of the above noted application (FCC Form 301) with FCC Form 155 on behalf of Staton Communications, Inc. in the above noted matter. Attached is the applicant's filing fee in the total amount of \$2,030.00.

Please send a stamped copy of same to me in the enclosed self addressed stamped envelope. Thank you for your kind assistance.

Sincerely,


Stanley G. Emert, Jr.

SGE:

Enclosure

cc: Staton Communications, Inc.

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JUN 24 1993

COHEN & BERFIELD

Before the
FEDERAL COMMUNICATIONS COMMISSION

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In re Applications of	:	MM DOCKET NO. 93-51
MARTHA J. HUBER	:	File No. BPH 911114ME
RITA REYNA BRENT	:	File No. BPH 911115MC
MIDAMERICA ELECTRONICS	:	
SERVICE, INC.	:	File No. BPH-911115ML
STATON COMMUNICATIONS, INC.	:	File No. BPH-911115MU
For construction Permit for	:	
a New FM Station on Channel	:	
234A in New Albany, Indiana	:	

- - - - - X

June 9, 1993

WASHINGTON, D.C.

Whereupon,

MILDRED J. STATON

the Deponent, called for examination by counsel pursuant to notice and agreement as to time and place, in the offices of Cohen and Berfield, 1129 20th Street, NW, Washington, D.C. 20036, before Kim Kavanaugh, a Notary Public in and for the District of Columbia, where were present on behalf of the respective parties:

1 subscription agreement, which is an exhibit to your
2 application. It's exhibit 1. Would you turn to the
3 back of the agreement, the last two pages, the signature
4 pages? Is that your signature on the agreement?

5 A. Yes.

6 Q. All right. And what is the date?

7 A. 11/14/91.

8 Q. Okay. When did you sign that stock
9 subscription agreement, did you sign it on the 14th?

10 A. As far as I can remember, yeah.

11 Q. Did you read the agreement before you signed
12 it?

13 A. Yes.

14 Q. At the time, what, if any, understanding did
15 you have regarding your financial obligations, if any to
16 Staton Communications?

17 A. You mean -- you want to explain that a little
18 bit? I'm not sure what you're referring to.

19 Q. When you signed the stock subscription
20